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NO. A-727

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1988

JONAS H. WHITMORE, INDIVIDUALLY,
AND AS NEXT FRIEND OF
RONALD GENE SIMMONS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

RONALD GENE SIMMONS, SR. — RESPONDENT

RESPONDENT RONALD GENE SIMMONS, SR.'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I.

Does the Constitutional ban against cruel and unusual punishment require that a mandatory appellate review be conducted in all cases in which the death penalty has been imposed?

II.

If mandatory appellate review of death penalty sentences is Constitutionally required, may that issue be raised by a third party?

TABLE OF AUTHORITIES

	Pages
Gilmore v. Utah, 429 U.S. 1012	. . . . 3, 5, 6, 7

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Respondent, Ronald Gene Simmons, Sr., by his attorneys, John Harris and Robert E. Irwin, respectfully prays that the Petitioner's writ of certiorari to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceedings on March 13, 1989, in which Petitioner Whitmore was denied the right to intervene on behalf of Ronald Gene Simmons, Sr., an Arkansas inmate scheduled to die by lethal injection, be denied.

STATEMENT OF THE CASE

During the evening hours of March 15, 1989, Ronald Gene Simmons, Sr., was eating his last meal. His execution was set for the next day at 7:00 a.m., the 16th day of March, 1989. The Respondent Simmons, had previously been tried in two separate cases, convicted, and sentenced to death for capital murder of sixteen individuals, including fourteen family members. After each conviction and sentence of death, Respondent Simmons was fully advised by counsel of his right

to appeal, potential grounds for appeal, and many other things concerning the appellate process. Respondent Simmons took the position that whether or not to appeal was a personal decision that could only be made by him, and it was his decision that the verdicts in the two previous cases were just and proper, and his only request was that the sentence be carried out without any delay; that life was cruel for him and he was suffering with it. Immediately after Respondent Simmons took this position, parties opposed to capital punishment, including a Catholic Priest and other death row inmates, came forward in both the Simmons I and the Simmons II cases, and attempted to intervene and delay these two proceedings in the following particulars: First, by claiming next friend status, and second, by asserting that the United States Constitution required a mandatory appeal in death penalty cases that cannot be waived by the defendant.

The trial court immediately gave these interlopers a hearing on their petitions, and also conducted a competency hearing to determine whether or not Respondent Ronald Gene Simmons, Sr., was competent and had knowingly and intelligently waived his right to appeal. After a full hearing on these matters, the trial court ruled that Respondent Ronald Gene Simmons, Sr., was competent, that he had in fact knowingly and intelligently waived his right to appeal, and as such, the petitioners would have no standing as next friend or otherwise, and as a matter of law, there was no mandatory appeal that could not be waived by a competent defendant.

The trial court's decision in Simmons I was immediately appealed to the Arkansas Supreme Court; and the Arkansas Supreme Court, without any notice to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the matter, granted the petitioners' request for stay of execution. However, ultimately, the Arkansas Supreme Court, after a full hearing on the matter, reversed

themselves and lifted the stay of execution, and specifically found that Respondent Ronald Gene Simmons, Sr., was competent and had knowingly and intelligently waived his right to appeal; that the petitioners as such would have no standing as next friend or otherwise; and that the law of Arkansas and the Constitution of the United States of America do not require a mandatory appeal that cannot be waived by a competent defendant.

Immediately thereafter, the petitioners in Simmons I filed for a petition for writ of habeas corpus in Federal District Court contending essentially the same things, and again, the Federal District Judge, without any notice to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the issue, granted a stay of execution. Ultimately, after full hearings and elaborate briefs on the matter, the Federal District Judge reversed himself and lifted the stay of execution, ruling that Ronald Gene Simmons, Sr., was in fact competent and had knowingly and intelligently waived his right to appeal, and as such, petitioners would not have any standing as next friend or otherwise, and that the Constitution does not require a mandatory appeal that cannot be waived by a competent defendant as set out in the authority of Gilmore v. Utah, 429 U.S. 1012 (1976).

After this last ruling, as mentioned earlier, Respondent Ronald Gene Simmons, Sr., was enjoying his last meal on the 15th day of March, 1989, prior to being executed at 7:00 a.m. on the following morning, when he happened to notice the monitor on the TV in the room, a news flash that the U. S. Supreme Court had stayed his execution pursuant to an application for stay of execution pending petition for writ of certiorari to the Supreme Court of Arkansas, filed herein by Petitioner Jonas H. Whitmore, individually and as next friend of Ronald Gene Simmons. This stay of execution by the U. S. Supreme Court was granted without any notice

to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the issue.

Subsequent to that ruling by the High Court, the petitioners in Simmons I filed a notice of appeal to the 8th Circuit Court of Appeals, and thereafter, filed a motion for stay of proceedings pending the outcome in the Simmons II case that is presently before the U. S. Supreme Court. The State of Arkansas, through its Attorney General's office, filed a response essentially acquiescing that the proceedings in the 8th Circuit Court of Appeals in Simmons I should be stayed pending the outcome of Simmons II before this court, and again, without any notice to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard, the 8th Circuit Court of Appeals issued its order staying all of those proceedings pending the outcome of Simmons II before the U. S. Supreme Court.

After all of this, and at the request of Respondent Ronald Gene Simmons, Sr., four motions have been filed in this Court as follows: (1) a Motion Requesting Expedited Review of Petitioner's Petition for Writ of Certiorari to the Supreme Court of Arkansas, (2) Motion for Oral Argument, (3) Motion of Respondent Ronald Gene Simmons, Sr., to be Present at Oral Argument, and (4) Motion to Require Petitioner to Post Bond to Cover Costs, Expenses, and Potential Damages.

REASONS FOR NOT GRANTING THE WRIT

CERTIORARI SHOULD NOT BE GRANTED TO DETERMINE WHETHER THE 8TH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT REQUIRES THAT A MANDATORY APPELLATE REVIEW BE CONDUCTED WHEN A SENTENCE OF DEATH IS IMPOSED AND TO DETERMINE WHETHER A THIRD PARTY MAY ASSERT SUCH CONSTITUTIONAL RIGHT IN BEHALF OF THE PERSON SENTENCED.

A. MANDATORY APPEAL

The Constitution of the United States of America is approximately two hundred years old, having been adopted in 1787; and the first ten Amendments, including the Eighth

Amendment, prohibition against cruel and unusual punishment, was adopted shortly thereafter. Since that time, I think it would be safe to say that literally dozens, and perhaps hundreds of people have been sentenced to death, and had their sentences carried through without any appellate review; and the Petitioners have been unable to cite any case within the last two hundred years whereby the U. S. Supreme Court specifically required appellate review of a death sentence, notwithstanding the defendant's waiver of appellate review. The mere fact that no case exists within the last two hundred years specifically requiring mandatory appellate review, is good authority in and of itself that the Constitution does not require mandatory review. But even more compelling is the fact that there is authority to the contrary, modern authority of recent origin in the form of Gilmore v. Utah, 429 U.S. 1012 (1976). In that case, Gary Gilmore was attempting to do exactly what Ronald Gene Simmons, Sr., is attempting to do herein: merely accept the sentence of the Court and waive his rights to appellate review, so that the sentence may be carried out in an expeditious manner and relieve him from the punishments inflicted upon him by life itself under these circumstances. The fact that the U. S. Supreme Court allowed Gary Gilmore to waive his rights for further appellate review is clear precedent for the issue now being debated before this Court, and one cannot diminish the significance of Gilmore by contending that the only matter resolved in that case was the question of standing. Clearly the entire matter was before the Court, the Court being fully and completely advised of what Mr. Gilmore was attemting to do, and the Court by their decision thereby cleared the way for th sentence to be carried out without any appellate review. If that Court had thought that the U. S. Constitution mandated appellate review, surely they had the authority and would have had the inclination to point out to the parties in

that litigation that the Constitution required mandatory appellate review and that would have been the end of that matter. The fact that the Court did not set out any such requirement is ample authority for the proposition that the Constitution does not mandate appellate review even in a death sentence, if the defendant knowingly and intelligently waives his right to said review.

The Gilmore case being a U. S. Supreme Court case, constitutes the supreme law of this land. It has to this date never been overturned or overruled, nor has the Contitution of the United States, in particular the Eighth Amendment, been amended to afford any other relief. One cannot seek any higher authority for resolution of this question than the U. S. Supreme Court, and until Gilmore is overruled, it must be followed.

B. STANDING OF THIRD PARTY

Quoting from United States District Judge Garnett Thomas Eisele in his Order filed September 23, 1988, in the Simmons I case:

"In Gilmore v. Utah, supra, the Supreme Court applied the waiver doctrine to deny relief in a case nearly identical to the one before this Court. There, a convicted murderer sentenced to death indicated after his trial that he did not wish to pursue any appeals, including direct appeals to the State Supreme Court. Id., at 1013 n.1. His mother, attempting to act as next friend, brought the case before the United States Supreme Court, which issued a stay and ordered the State to file certain materials. Ten days later, after examining the State filings, the Court entered an Order terminating the stay:

> After carefully examining the materials submitted by the State of Utah, the Court is convinced that Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he mights have asserted after the Utah trail court's sentence was imposed, and, specifically, that the State's determinations of his

> competence to knowingly and intelligently waive any and all such rights were firmly grounded.

Chief Justice Burger filed a concurring opinion, joined by Justice Powell, in which he amplified the finding of a knowing and intelligent waiver. 429 U.S., at 1013-17. First of all, since the State had established that Gilmore was competent, his purported next friend could have no standing to proceed on Gilmore's behalf. Id., at 1014. Consequently,

> it is plain that the Court is without jurisdiction to entertain the "next friend" application filed by [Gilmore's mother]. This Court has jurisdiction pursuant to Art. III of the Constitution only over "cases and controversies," and we can issue stays only in aid of our jurisdiction. 28 U.S.C. ss. 1651, 2101(f). There is no dispute, presently before us, between Gary Mark Gilmore and the State of Utah, and the application of Bessie Gilmore manifestly fails to meet the statutory requirements to invoke this Court's power to review the action of the Supreme Court of Utah. No authority to the contrary has been brought to our attention, and nothing suggested in the dissent bears on the threshold question of jurisdiction.
>
> Id., at 1016."

The Gilmore v. Utah case is so directly on point on both the question of mandatory appeal and standing, that Respondent Ronald Gene Simmons, Sr., sees no necessity to cite any other cases or authorities for this matter; but in addition, this Respondent would like to state that it should be sufficient for a criminal defendant to have all of the power and the forces of the State of Arkansas assembled against him in an adversary proceeding. That, in itself, should be enough, but in this case, the petitioners want to eliminate the representation of Simmons' chosen lawyers to be substituted therewith by lawyers of petitioners' choice, to work, not for Simmons, but to work in furtherance of their own personal and political philosophies, and to specifically work against the express interest of Respondent Simmons. How patently unfair this seems on its face. Surely, common sense and reason will prevail in this matter, but the question has to be when. The petitioners in this case lost on these very arguments in the trial court below.

The petitioners in this case lost on these very arguments before the Arkansas Supreme Court. The petitioners in this case lost on these very arguments before the United States District Court. And now, for the fourth time, these petitioners are before this Court, and even though they lose here, as surely they must, they are winning every time a court grants a stay of execution in this matter, and they are winning their personal gains at the expense of the Respondent Simmons, both physically, mentally, and monetarily, at the expense of the victims of the crime, and their relatives and friends, at the expense of the taxpayers of the State of Arkansas, and at the expense of the public generally, of which the vast majority believe in capital punishment in a proper case. More particularly, the petitioners are subjecting the Respondent Simmons to cruel and unusual punishment in direct conflict with the Eighth Amendment to the United States Constitution. They have taken the matter away from the courts and are assuming the lofty position of deciding among themselves when and if Gene Simmons will be put to death. They have completely circumvented and thwarted the judicial process in this case, and others like them have thwarted the judicial process in capital cases in this Country for decades.

In a democracy, the majority should rule, and since the majority of the people of this State and this Nation believe in capital punishment, the law of this land and the law of this State clearly provide for capital punishment in a proper case, but the State of Arkansas has been ineffectual in enforcing this law, and our criminal justice system is in much disrespect for it. In the State of Arkansas alone, for the past twenty-five years there has been no enforcement of capital punishment; and according to a recent U.P.I. release from the Bureau of Justice Statistics, an arm of the Justice Department, it is reported that only twenty-five

people were executed in eight States in 1987, the most since the Supreme Court reinstated the death penalty in 1976, and as of December 1, 1988, a record of 1,984 offenders were on death row in thirty-four States. Obviously from these statistics, capital punishment in Arkansas is purely illusory. It cannot in this form serve as any deterent. Therefore, with all due respect, this writer would assert that society demands that capital punishment be enforced fairly and expeditiously,or in the alternative, be abolished in its entirety.

Respondent Simmons conterds that since obviously the petitioners have no standing to intervene in this matter, this Court should be without jurisdiction to make any decisions adverse to him, and that the decision of whether or not to appeal is a personal decision that can be exercised only by him.

As a matter of fact and law, assume arguendo or hypothetically, if Respondent Ronald Gene Simmons, Sr., were offered a pardon, would the Petitioner Jonas H. Whatmore, a death row inmate, or anyone else, have standing to deny Respondent Simmons a pardon so that crimes such as Simmons' may be included within the data base and thereby inure to the benefit of Petitioner Whitmore? I think not. Whether or not a defendant even accepts a pardon is a personal decision for the defendant to make, the same as the defendant's right to appeal or not to appeal.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari to determine whether the Eighth Amendment's ban against cruel and unusual punishment requires mandatory appellate review in death penalty cases, and whether the right may be asserted by a third party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the annexed Response to Petition for Writ of Certiorari to the Supreme Court of Arkansas has been timely filed, pursuant to Rule 28.2 of the Rules of this Court by sending a copy via United States Mail postage pre-paid, addressed to the Clerk of this Court.

I further certify that I served the said Response to Petition for Writ of Certiorari on Petitioner and Respondent State of Arkansas, by placing a copy in the United States Mail, first class, postage pre-paid, addressed as follows:

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Fourth and Center Streets
Little Rock, AR 72201

Done this 22nd day of May, 1989.

John Harris
Attorney for Respondent Ronald Gene Simmons, Sr.

STATE OF ARKANSAS
COUNTY OF POPE

Subscribed and sworn to before me, Notary Public, on this 22nd day of May, 1989.

Notary Public

My commission expires:
4-25-90